Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NIKE, INC., *et al.*,

Petitioners,

v.

MARC KASKY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

BRIEF *AMICI CURIAE* ON BEHALF OF THE ARTHUR W. PAGE SOCIETY, THE COUNCIL OF PUBLIC RELATIONS FIRMS, THE INSTITUTE FOR PUBLIC RELATIONS, THE PUBLIC AFFAIRS COUNCIL AND THE PUBLIC RELATIONS SOCIETY OF AMERICA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does corporate speech that is inextricably part of a vital debate about matters of public interest become "commercial" because, although it does not propose a commercial transaction, it may "maintain [corporate] sales and profits?"

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BRIEF *AMICI CURIAE* ON BEHALF OF THE ARTHUR W. PAGE SOCIETY, THE COUNCIL OF PUBLIC RELATIONS FIRMS, THE INSTITUTE FOR PUBLIC RELATIONS, THE PUBLIC AFFAIRS COUNCIL AND THE PUBLIC RELATIONS SOCIETY OF AMERICA IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*[1]

The Arthur W. Page Society, founded in 1983, is a professional organization with approximately 300 members consisting of chief corporate public relations officers of major companies, as well as other leaders in the public relations profession who are closely related to corporate public relations. Its goals are to strengthen the management policy role of the corporate public relations officer; develop knowledge of corporate management issues; educate the public about the role of public relations management; encourage research that leads to improvement in the corporate public relations function and to introduce these concepts to scholars, teachers and students.

The Council of Public Relations Firms represents the business of public relations and corporate communications. Its 120 member firms include all of the ten largest firms and over three quarters of the top 50 firms (measured by revenue) in the world. Together, *amici* and its members represent every facet of the public relations and corporate communications industry. The mission of the Council of Public Relations

1. Letters from both parties consenting to the filing of all briefs have been filed with the Clerk of this Court. Counsel for the *amici* were the sole authors of this brief. No person or entity other than *amici* made a financial contribution to this brief.

Firms is to advance the business of public relations by building the value of public relations as a strategic business tool, by helping its member firms set the standards for the profession and by promoting the benefits of careers in public relations.

The Institute for Public Relations, established in 1956 by a senior group of public relations professionals, is devoted to advancing the professional knowledge and practice of public relations through research and education. It has supported more than 200 research projects, ranging from what students of public relations must study in order to understand the profession to how new technologies affect the public relations profession, as well as sponsored numerous competitions and awards to reward excellence in the field.

Formed in 1954 at the urging of President Dwight D. Eisenhower, the Public Affairs Council is one of the leading associations for public affairs professionals. It provides unique information, training and other resources to its members to support their effective participation in government, community and public relations activities at all levels. Nearly 600 member corporations, associations and consulting firms work together to enhance the value and professionalism of the public affairs practice, and to provide thoughtful leadership as corporate citizens.

The Public Relations Society of America is the world's largest organization for public relations professionals. Its nearly 20,000 members, organized into 116 chapters, represent business and industry, technology, counseling firms, government, associations, hospitals, schools, professional services firms and nonprofit organizations. Chartered in

1947, its primary objectives are to advance the standards of the public relations profession and to provide members with professional development opportunities through continuing education programs, information exchange forums and research projects conducted on the national and local levels.

Amici counsel companies on the impact of their decisions and actions upon shareholders, employees, customers and other stakeholders. They also assist companies of all types to gather and disseminate information related to their businesses and communities on all conceivable topics, from investor relations, to philanthropic and community outreach programs, to corporate crisis communications. For decades, *amici* have relied on the First Amendment protections available to all speakers, regardless of their identity, to engage in robust public debate about issues of public concern without fear of the risk of strike suits. This protection has become even more vital over the last several decades, because, as Arthur W. Page[2] put it, it is increasingly true in the information age that "all business in a democratic country begins with public permission and exists by public approval." http://www.awpagesociety.com/public/about/apabout.html (last visited Feb. 26, 2003). Because the California Supreme Court's decision will have an unfair, unprecedented and materially chilling impact on the ability of companies and *amici* to speak on issues of public concern, *amici* urge the Court to reverse the judgment of the California Supreme Court.

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2. Arthur W. Page, who was the first chief corporate communications officer to sit on the board of directors of a major U.S. corporation (AT&T), is credited with having established the profession of corporate communications.

SUMMARY OF ARGUMENT

The California Supreme Court incorrectly held that claims asserted under California's unfair competition and false advertising laws on the basis of letters to the editor, press releases and other corporate communications may, consistent with the First Amendment, give rise to strict liability. It based this conclusion on its *sui generis*, three-part definition that "commercial speech" is any "representation[] of fact": (1) made by "commercial" speakers "engaged in commerce"; (2) to an audience that may include potential purchasers or that may report on the issue to potential consumers; (3) about a topic related to "business operations." *Kasky v. Nike, Inc.*, 45 P.3d 243, 247, 256 (Cal. 2002).

This new test creates an Orwellian preference for public debate bereft of facts. That result cannot be squared with the First Amendment.

This new test sweeps within its scope ***any*** factual statement, including letters to the editor and opinion editorials; statements published on web sites; media presentations; press releases; television appearances; appearances on the Newshour with Jim Lehrer[3]; C-Span

3. *See, e.g., Newshour with Jim Lehrer: Sharing the Wealth* (PBS television broadcast, January 6, 2003) (Mark Deem, Engineering Director of The Foundry, and other executives discussing how to account for stock options); *Newshour with Jim Lehrer: Newsmaker: Phillip Knight* (PBS television broadcast, May 13, 1998) (Phillip Knight, CEO of Nike, discussing Nike and globalization); *Newshour with Jim Lehrer: Return of Thalidomide* (PBS television broadcast, August 4, 1998) (John Jackson, CEO of Celgene, on the

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appearances[4]; indeed, ***any*** public statement made by a company about a topic related to what that company does. As a result, the press as a whole—from a newspaper's business section to CNN's Lou Dobbs and CNBC—will suffer a dearth of information because silence will become the prudent course of action for business executives and spokesmen.

This will result in the compelled self-censorship of an enormous amount of protected speech on important matters

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FDA's decision to give limited approval to Thalidomide and Celgene's possible marketing of the drug); *Newshour with Jim Lehrer: Bridging the Gap* (PBS television broadcast, March 20, 1996) (Aaron Feurstein, CEO of Malden Mills, discussing corporate responsibility and the wage-profit gap; using examples from Malden Mills); *Newshour with Jim Lehrer: Megamerger Masters* (PBS television broadcast, January 12, 2000) (Steve Case, CEO of America Online, and Gerald Levin, CEO of Time Warner, discussing the impending AOL Time Warner merger and how the consolidation was in the public interest).

4. *See, e.g.*, Speech by Steve Ballmer, CEO of Microsoft (C-Span television broadcast, November 12, 2002) (Mr. Ballmer discussed Microsoft's recently approved antitrust settlement with the Department of Justice); Leo Mullin, Delta Airlines, Chairman & CEO (C-Span television broadcast, September 25, 2002) (Mr. Mullin discussed the financial well-being of the airline industry and what must be changed in order for airlines to survive); Speech by James Robbins, President and CEO, Cox Communications (C-Span television broadcast, October 22, 2002) (discussing the cable industry); AEI Conference on Productivity & the American Economy — Part 1 (C-Span television broadcast, October 23, 2002) (a panel discussion on the economy including Dick Davidson, Chairman & CEO, Union Pacific Corporation; Marilyn Carlson Nelson, Chairman & CEO, Carlson Company).

of public concern because the issues also happen to touch upon the speaker's "business operations":

- Johnson & Johnson's swift public response to Tylenol cyanide tampering in 1982 would, under *Kasky*, expose it to strike suits, *see* pp. 13-15, *infra*;

- McDonald's could no longer effectively respond to critics such as Eric Schlosser and his book FAST FOOD NATION, *see* pp. 10-12, *infra*;

- Advanced Cell Technology and other companies would risk suit by entering the public debate on cloning, *see* pp. 15-16, *infra*;

- General Motors and other companies would run increased risks by commenting on the pros and cons of airbags for child safety.[5]

- Technology companies would incur litigation risks by discussing the need for "green card" quota increases to bring specialists into the United States.[6]

5. *See, e.g.*, Precious Cargo, available *at* http://gm.com/company/gmability/ safety/child_passenger_safety/precious_cargo/index.html (last visited Feb. 26, 2003) ("Another reason to restrain children properly, in a rear seat, is the vehicle's frontal air bags, which are designed to restrain adults. Air bags have to inflate very quickly, faster than a person can blink an eye, and with great force. Serious injury, and even death, can result for anyone—especially a child—who is up against, or close to, a frontal air bag when it inflates").

6. *See, e.g., Newshour with Jim Lehrer: High-Tech Workers* (PBS television broadcast, Apr. 3, 1998) (T.J. Rodgers, CEO of (Cont'd)

- Drug and biotech companies would have to rethink whether they can comment on the effect of the Food and Drug Administration approvals process on the flow of their new products to the market.[7]

This list obviously is not exhaustive. Because the *Kasky* test covers any utterance where consumers might be present or might be expected to receive the information through media outlets, corporate speech as we know it will disappear from every medium of communication with the public.

All of this strikes *amici* particularly hard. As a *Financial Times* editorial reported, "if companies face potentially devastating liability for speaking, their only alternative is to say nothing at all." *Protect Free Speech: A California Court Ruling Threatens a Vital Principle*, FINANCIAL TIMES, Dec. 9, 2002 at 22. As troubling as the *Kasky* decision may be for advertisers and advertising agencies, at least there is a well-developed body of law (federal and state) that provides guidance regarding when advertising is false and subject to litigation. No such rules exist for the corporate speech that

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Cypress Semiconductor, stating "We hire all the Americans we can get" but that green cards still needed for foreign engineers and specialists because there are not enough American engineers to keep pace the demand for expansion. Rodgers also stated: "I promise that every time I get one of those engineers I will create five more jobs right here in America for Americans to build and sell those products").

7. *See, e.g., Pharmaceutical Innovation: the enabling conditions, at* http://www.merck.com/overview/98ar/p6.htm (last visited Feb. 26, 2003) ("It is critical that the U.S. Food and Drug Administration approve safe and effective new medicines in a timely fashion, so that people who need them will get them as quickly as possible").

amici help create and disseminate because, prior to the California Supreme Court's decision, that speech correctly was considered to be fully protected, core speech regarding matters of public concern. This makes it difficult, if not altogether impossible, for *amici* and their clients to anticipate where the California courts will draw the line between "misleading" and non-actionable statements.

The *Kasky* decision inevitably will stymie public relations professionals' ability to assist corporations to maintain an open dialogue with the public and engage in the "uninhibited, robust and wide-open" public debate that was previously thought to be protected by the First Amendment. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Given the significance of this potential outcome, *amici* urge the Court to weigh heavily the likely consequences of the judgment of the California Supreme Court and reverse its erroneous decision.

ARGUMENT

I. FACTUAL CORPORATE COMMUNICATIONS ARE A VITAL COMPONENT OF UNFETTERED DEBATE ON MATTERS OF PUBLIC CONCERN

Corporate speech is vitally important to a functioning democracy. As corporations and the communities in which they reside and operate have become more closely linked over the past two decades, the public has come to expect a new level of civic engagement from corporations. *See* EDMUND M. BURKE, CORPORATE COMMUNITY RELATIONS xiv (1999) ("The public environment in which companies operate today . . . is far different than it was just 20 years ago. There are dramatic and far-reaching changes in the expectations of communities and societies today that define and influence

how a company can operate"). Public relations professionals facilitate this interaction between the public and companies by providing factual information on topics of interest to both groups. Indeed, the public has made clear that its preference is for more openness and communication from companies, not less.[8] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (instituting several measures designed to increase corporate transparency).

That corporate speech and advocacy play a significant role in informing public debate and shaping public opinion and policy is beyond dispute. Government schools now recognize the increased role of and expectations for business in American democracy by offering courses in this area. *See* Harvard's John F. Kennedy School of Government Course Catalog, KSG BGP-232 "Business as a Political Actor" (describing course designed to analyze the important role that "[b]usinesses play . . . in the public policy processes of capitalist democracies"); *see also* Columbia's School of International and Public Affairs Course Catalog, INAF U9178.001 "Human Rights and Corporate Responsibility" (describing course designed to analyze the "complex questions arising out of the interaction of business activities and human rights. . . .").

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8. Even one of Nike's most vocal critics has subsequently stated "[w]hatever one thinks of Nike, it is a crucial participant in this continuing debate." Bob Herbert, *Let Nike Stay in the Game*, NEW YORK TIMES, May 6, 2002, at A21.

II. PUBLIC RELATIONS ACTIVITIES THAT MAKE IMPORTANT CONTRIBUTIONS TO PUBLIC DEBATES WILL BE CHILLED BY *KASKY*

For decades, corporate and non-corporate speech on the same topics have appeared together in all of the media traditionally associated with First Amendment purposes: (a) editorials and letters to the editor; (b) paid-for advertised editorials in newspapers, magazines, and other publications; and (c) appearances on news shows and at other public forums. Often, as is the case here, corporations speak out to respond to critical speech. Whether by design or because of lack of access or resources fully to research the issue, such criticism often leaves out important facts vital to a comprehensive presentation of the issues involved.

For example, in 2001, Eric Schlosser published FAST FOOD NATION, a best-selling social-cultural critique of the fast food industry. The book criticized several aspects of the fast food industry, such as: its contribution to low-wage, unskilled jobs; its role in the dramatic increase in rates of obesity; and, its role in the homogenization of American neighborhoods. *See* Eric Schlosser, FAST FOOD NATION 3-10 (2001). Although the book criticized the industry as a whole, it focused in large part on the practices at McDonald's. Faced with a damning critique of all facets of its business, McDonald's vigorously argued the book provided an incomplete picture. *See, e.g.*, Milford Prewitt, *Critics Slam Best-Seller Critique of QSR*, NATION'S RESTAURANT NEWS, Jun. 11, 2001, at 4 ("The real McDonald's bears no resemblance to anything described in that book. The author is wrong about our people, wrong about our jobs and wrong about our food. He also completely ignores our values, which is not surprising since he never contacted us for any information whatsoever"). Other

reviewers also questioned the accuracy of the account. *See* Regina Schrambling, *Catching America With Its Hands in the Fries*, NEW YORK TIMES, Mar. 21, 2001, at F1 ("Some reviewers have accused Mr. Schlosser . . . of playing fast and loose with the facts").

In order to fill the gaps that it felt were missing, McDonald's engaged in the traditional response—counter-speech of its own—to present a fuller account of its business. *See, e.g.*, Bonnie Harris, *In Fast Food, Some See Fast Track*, LOS ANGELES TIMES, Mar. 12, 2001, at C1 (describing how many Latinos view McDonald's and other restaurant chains as a key to long-term financial security, and quoting McDonald's spokesman Walt Riker as stating, "We've always disputed the idea that fast-food jobs are dead-end jobs, and our Hispanic workers are evidence of that. We value their work, and we're continuing to encourage their advancement through training and other programs"); *see also* Meredith May, *Teachers Sizzle Over Fast Food Fund-Raiser*, SAN FRANCISCO CHRONICLE, Oct. 15, 2002, at A1 (in response to criticisms that McDonald's encourages obesity, McDonald's spokeswoman pointed out that it was the first major fast food restaurant to introduce salads and reduce the fat content of its products).

Until the California Supreme Court's decision, a corporation like McDonald's right to defend itself and its shareholders from criticism and to present a complete record was grounded on the same unfettered First Amendment protection that the critic enjoyed. In granting critics First Amendment protection in attacking a company while simultaneously denying that same protection to the company in responding to those allegations, the *Kasky* decision impermissibly favors speech from a particular viewpoint. *See R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Indeed, McDonald's response to FAST FOOD NATION graphically illustrates

the unworkability of the *Kasky* test; literally every statement McDonald's made in response—no matter what the issue—concerned its "business operations," because that is precisely what the book attacked.[9]

Under the *Kasky* regime, however, McDonald's choice is either to stay silent or risk a potential suit for defending itself publicly. The adverse consequences of silence, however, are quite substantial. Not only does silence deprive the public of important information to contextualize debates, it creates a public presumption of either stonewalling or guilt. For that reason it long has been standard communications strategy that a "no comment" is just about the worst comment a corporation can make. *See, e.g.*, Sandi Sonnenfeld, *Media Policy — What Media Policy?*, 8/1/94 HARV. BUS. REV. 18, 20 (1994) ("There was a time when 'no comment' meant simply 'no comment.' But today when a company spokesperson says 'no comment,' it implies that the organization has something to hide"). Indeed, the public often perceives the "words no comment . . . as guilt." Steve Gosset, *Avoiding PR Disasters*, HARVARD MANAGEMENT COMMUNICATION LETTER (2001).[10]

9. In responding to the concerns raised by FAST FOOD NATION, McDonald's has made numerous factual statements concerning its "business operations." *See, e.g.*, McDonald's Social Responsibility Report, available *at* http://www.mcdonalds.com/corporate/social/report/index.html (last visited Feb. 26, 2003) ("Employees are respected and valued"; "Employees receive work experience that teaches skills and value that last a lifetime"; "Pay is at or above local rate in marketplace").

10. *See also Corporate Crises Have Long-Term Impact New Consumer Survey Finds*, BUSINESS WIRE, Aug. 17, 1993 (citing study of over 1,000 respondents conducted by national public relations agency finding nearly two-thirds of those questioned took

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The *Kasky* decision also creates a false dichotomy between fact and opinion and suggests that corporate statements on issues of public concern can receive First Amendment protection only if they are pure ***opinion***, a false dichotomy that makes the decision even more unworkable. *See, e.g.*, *Board of Trustees v. Fox*, 492 U.S. 469 (1989); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). This element of the *Kasky* decision strikes at the heart of *amici's* business because companies look to *amici* to maintain open lines of communication with the public. *Amici* assist in researching fully the facts surrounding a given issue and design strategies efficiently to deliver this information to the public. The importance of this free flow of factual information cannot be overstated.

It is difficult to imagine a more profound example of the public benefits of unfettered corporate speech than Johnson & Johnson's response to the Tylenol cyanide crisis. In the fall of 1982, seven people died from ingesting cyanide contained in tampered Tylenol capsules. In the hours following the first news of the crisis, Johnson & Johnson made the crucial decision to communicate everything it knew to the public. As George Frazza, Johnson & Johnson's General Counsel at the time, stated: "[w]e decided we were going to communicate, to be active . . . We were determined to find out what the facts were, and whether we liked them or not, communicate them without gloss to all of our constituencies." *See* Anthony Krulwich, *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product*

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"no comment" as a signal of guilt); Al Frank, *No Comment = No Credibility*, STAR-LEDGER, Aug. 6, 2002 (citing study by Hill & Knowlton and Opinion Research Corp. finding that 62% of respondents equated "no comment" with guilt).

Liability Considerations, 39 BUS. LAW. 757, 767 (1984). As a result, Johnson & Johnson maintained an open dialogue with the press and public throughout the crisis. *See, e.g.*, *5 Die After Taking Tylenol Believed to Contain Cyanide*, NEW YORK TIMES, Sept. 30, 1982 at A12 (Lawrence Foster, a Johnson & Johnson spokesman, describing what information had been learned from authorities and Johnson & Johnson's method of distribution); *see also MacNeil/Lehrer Report: Cyanide Investigation* (PBS television broadcast, Oct. 1, 1982) (Dr. T.N. Gates, medical director of Tylenol, appearing as one of the guests and discussing the manufacturing and distribution of Tylenol in the context of the cyanide crisis).

Johnson & Johnson's forthrightness with the public saved not only the Tylenol brand and perhaps even Johnson & Johnson itself, it contributed to the way American consumer goods are packaged and labeled to be tamper-resistant. *See* Tamar Lewin, *Tylenol Posts an Apparent Recovery*, NEW YORK TIMES, Dec. 25, 1982 at A30 (quoting a market researcher's conclusion that Johnson & Johnson's recovery due to "forthright manner" in dealing with the public during the Tylenol crisis). *Kasky*'s regime of strict liability, however, would inhibit such open communication. Under *Kasky*, if a company makes a broad statement or unintentionally publishes incorrect information concerning its distribution practice (undeniably part of its "business operations"), the proscribed corrective action is so punitive that it may dissuade companies from communicating in the first place.[11]

11. During the cyanide crisis, Johnson & Johnson made multiple statements about its "business operations" that would potentially be a basis for liability under *Kasky*. *See, e.g.*, *McNeil/Lehrer Report: Cyanide Investigation* (Dr. Gates' comments that "We are confident . . . that our security, our quality assurance procedures are such that

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The harsh results of suppressing this openness are difficult to overstate: Johnson & Johnson's swift public communications literally are credited with saving human life. Of the eight million capsules recalled after Johnson & Johnson began its campaign, seventy-five were found to contain cyanide. *See* Harvey L. Pitt & Karl A. Groskaufmanis, *When Bad Things Happen to Good Companies: A Crisis Management Primer*, 1149 PLI/Corp 307, 309.

Debates on some of the most important issues of our time have been shaped and influenced by corporate speakers and public relations professionals such as *amici*. One such debate centers on scientific advances in the field of medicine, and the ethical issues those advances raise, for example, the science of cloning and the possible medical uses for the technology associated with it. As such advances came to the public's attention, a vigorous debate ensued concerning the ethical implications of these scientific discoveries. *See* "Therapeutic Cloning Under Fire" *at* http://www.lef.org/magazine/mag2002/mar2002_cover_west_ 01.html (Mar. 2002) ("when he [Advanced Cell Technology's ("ACT") CEO Dr. Michael West] announced recently that ACT had taken the first step towards human therapeutic cloning, he was suddenly criticized by everyone from President Bush to the Pope").

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this could not have happened in the process of the packaging — manufacture and packaging of the product"; "We do have cyanide in our analytical laboratories because it is required for certain tests . . . But it would not be in any way accessible to the manufacturing process"; "Well, we're shocked, we're dismayed, we've learned that medications can be tampered with at the, we believe at the retail level").

Corporations that have a financial interest in cloning technologies have joined the public debate to add a unique perspective on the issue. ACT itself, which initially made the scientific breakthrough making cell cloning possible, has taken a diametrically opposed view to cloning's critics. *See id.* ("No serious ethicist or embryologist believes that a pre-implantation embryo is a human being. We are not talking about creating a pregnancy. We are talking about making a microscopic ball of cells with no body cells of any kind"). It is precisely these representations about ACT's cloning process, especially in the form of the robust analogies used by Dr. West, that would become fodder for strike suits (as well as suits brought by political advocacy groups opposed to human cloning).

III. THE *KASKY* TEST COVERS AN ENORMOUS AMOUNT OF PROTECTED CORPORATE SPEECH

As disparate as the public statements described above may be, they all share characteristics that illustrate why this Court should reverse the California Supreme Court's decision: (1) all concern issues of great public moment; (2) all involved the dissemination of facts related to the company's "business operations"; and (3) the corporations involved all stood to benefit financially as a result of the speech, even though many of the public statements also were made in part to affect legislation, promote public safety and/or affect other regulation. If the *Kasky* decision stands, however, these communication efforts will be subject to a new strict liability standard that will incentivize critics not to respond with more speech, but class action lawsuits.[12]

12. One observer has noted that already the number of U.S. companies publicly issuing corporate responsibility reports has (Cont'd)

The amorphous nature of the test also means that, as a practical matter, there is no guidance for *amici* or others to determine what corporate speech is entitled to First Amendment protection. The broad language of the *Kasky* decision creates an illusory distinction between "policy" discussion and commercial speech, which the California Supreme Court now defines as any statement about "actual conditions and practices" of the business. This distinction is unworkable in practice. The end result is that the test contains no limiting principles because it falsely assumes that because a corporation always is, in part, motivated by profits, its speech is entitled to no First Amendment protection. This is at odds with the Court's well-settled precedent. *See, e.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952) (speech is entitled to full First Amendment protection notwithstanding it is undertaken by "large-scale business conducted for private profit"). The risks under the *Kasky* regime are even greater because *amici* often do not control the final presentation of press releases and other communications to the public, the media does. *Cf. Kasky*, 45 P.3d at 256 (statements made to reporters that are passed along to

(Cont'd)
dropped from 78 in 2001 to 58 in 2002. *See* Gary Young, *Nike Ruling: Just How Chilling Is It?*, NATIONAL LAW JOURNAL, Jan. 20, 2003, at A9; *see also* Peter Clarke, Address at SRI Media Conference (Nov. 2, 2002):

> Many, many funds in Europe screen on social, environmental and other issues . . . For example, the Dow Jones Sustainability Index, the FTSF4 Good Index, and Euronext are actual stock market indices comprised of companies that are considered to be more socially responsible . . . The California decision might create a pretext for those companies to hide behind that decision so as not to go forward and publish their CSR reports.

consumers can be commercial speech). Prudent, risk-averse companies will have no option but to decline speaking in order to avoid the possibility of strike suits.

Indeed, for those corporations who enter the public debate, California's broad remedies impose another, even more chilling threat. That law provides as a remedy for speech that, even though true on its face, may mislead some, a "Court-approved public information campaign" to compel a corporation to "correct" editorials and other speech on matters of public importance. *Kasky*, 45 P.3d at 250. In other words, under the California Supreme Court's test, not only would the corporation's speech be subject to a stricter standard of liability than the speech of its critics, but the company could be compelled to finance a "public-information campaign" entirely against its interest to address potential "confusion" on the public's part.

This is fundamentally at odds with the governing principles of the First Amendment. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (California Public Utilities Commission's order that PG&E permit the "extra space" in its envelopes sent to customers to be used by a public interest group to voice a point of view PG&E did not agree with held to violate PG&E's First Amendment right not to speak). It inevitably will result in a lopsided debate dominated by corporate critics, bereft of facts that reside exclusively with corporations. The consequences to a fully informed public are difficult to overstate, as Johnson & Johnson's life-saving Tylenol campaign graphically demonstrates.

In short, because corporations are entities whose decision makers owe fiduciary duties to shareholders and owners, no responsible corporate spokesman speaks on a company's behalf

without being concerned about the effects the statements may have on corporate sales and profits. Because all corporate speech is, and should be, uttered in the interests of benefitting the corporation in the eyes of potential consumers, the speech restricting effects of the California Supreme Court's test will be enormous.

CONCLUSION

For the foregoing reasons, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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